IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 739 OF 2001

Ramchandra Tatyaba Jadhav. ... Appellant.

Versus.

Sampat Bhiku Kamble & ors. ... Respondents.

Shri G.H.Keluskar for the Appellant.

Smt.Sujata Mogre for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 20th January, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. The Second Appeal is preferred by the unsuccessful Plaintiff in a suit for DECLARATION OF OWNERSHIP AND FOR permanent injunction. The case of the Appellant is that the suit lands are in his actual and physical possession and there was obstruction to his possession from the Respondents. The suit was resisted by the Respondents by filing written statement. The case of the Respondents is that they are cultivating the suit land and they were in actual and physical possession of the suit land on the date of institution of the suit. The Respondents relied upon the orders made in their favour under section 70(b) of the Bombay Tenancy and Agricultural Lands Act, 1948 holding that the Respondents are tenants in respect of the suit lands. A reliance was also placed on the order passed under section 32-G of the said Act of 1948 in their favour.

It is stated by the Respondents that the Appellants preferred an Appeal against the order passed in tenancy proceedings which were dismissed and the said order has not been challenged by the Appellants.

2. The trial Court after referring to the orders passed by the authorities under the said Act of 1948 dismissed the suit.

3. An Appeal was preferred by the Appellant before the District Court. The Appellate Court dismissed the Appeal. There was a cross objection filed by the Respondents for challenging the rejection of their counter claim filed in the suit. Placing reliance on the orders passed by the authorities under the said Act of 1948, the Appeal Court held that the Respondents are tenants in respect of the suit land and they are in possession thereof. Therefore, the Appeal Court allowed the cross objections filed by the Respondents and passed a decree declaring that the Respondents are in possession of the suit land and that they are entitled to retain their possession.

4. Shri Keluskar, learned Counsel appearing for the Appellant submitted that the Appeal Court has committed an error by observing that the order passed in the Appeal preferred by the Appellant against the order passed under section 70(b) of the said Act of 1948 has

not been challenged by the Appellant. He stated that in fact the Appellant has filed a Revision Application No.77/B/2001/NS and the same is pending. He fairly pointed out that initial order of stay passed in the said Revision Application has been vacated subsequently and as a result thereof there is no order of stay operating in the Revision Application. He, therefore, submitted that in case the Revision Application is allowed, the Second Appeal must succeed as in such an event the Respondents will not be entitled to claim any right, title and interest in respect of the suit lands.

5. There is a categorical finding of fact recorded by the Appellate Court that the Respondents were in possession on the date of institution of the suit and they are entitled to continue in possession. I find that the said finding is based on the evidence on record and no interference is required so far as the said finding on the issue of possession is concerned.

6. It is an admitted position that the operation of the orders passed in favour of the Respondents under the said Act of 1948 is not stayed in the Revision preferred by the Appellant in the Revision preferred by the Appellant and the said orders are operating.

7. The suit filed by the Appellant was for perpetual injunction on assumption that he was in possession of

the suit land. As found by the Appellate Court, the Respondents were in possession on the date of institution of the suit and therefore, even if it is assumed for the sake of argument that the Revision Application preferred by the Appellant is allowed, the Appellant cannot succeed in such a suit, as he has not prayed for possession. By allowing counter claim the appellate Court has held that the Respondents are entitled to possess the suit lands. The said decree is based on the order under the said Act of 1948 which is operating in favour of the Respondents. In the event the Revision Application preferred by the Appellants is allowed by the Competent Authority, the Appellant can always file a suit for possession on title against the Respondents and such suit will be decided on its own merits. Subject to the observations made above, the Second Appeal is dismissed with no order as to costs.

8. Certified copy is expedited.

Judge.